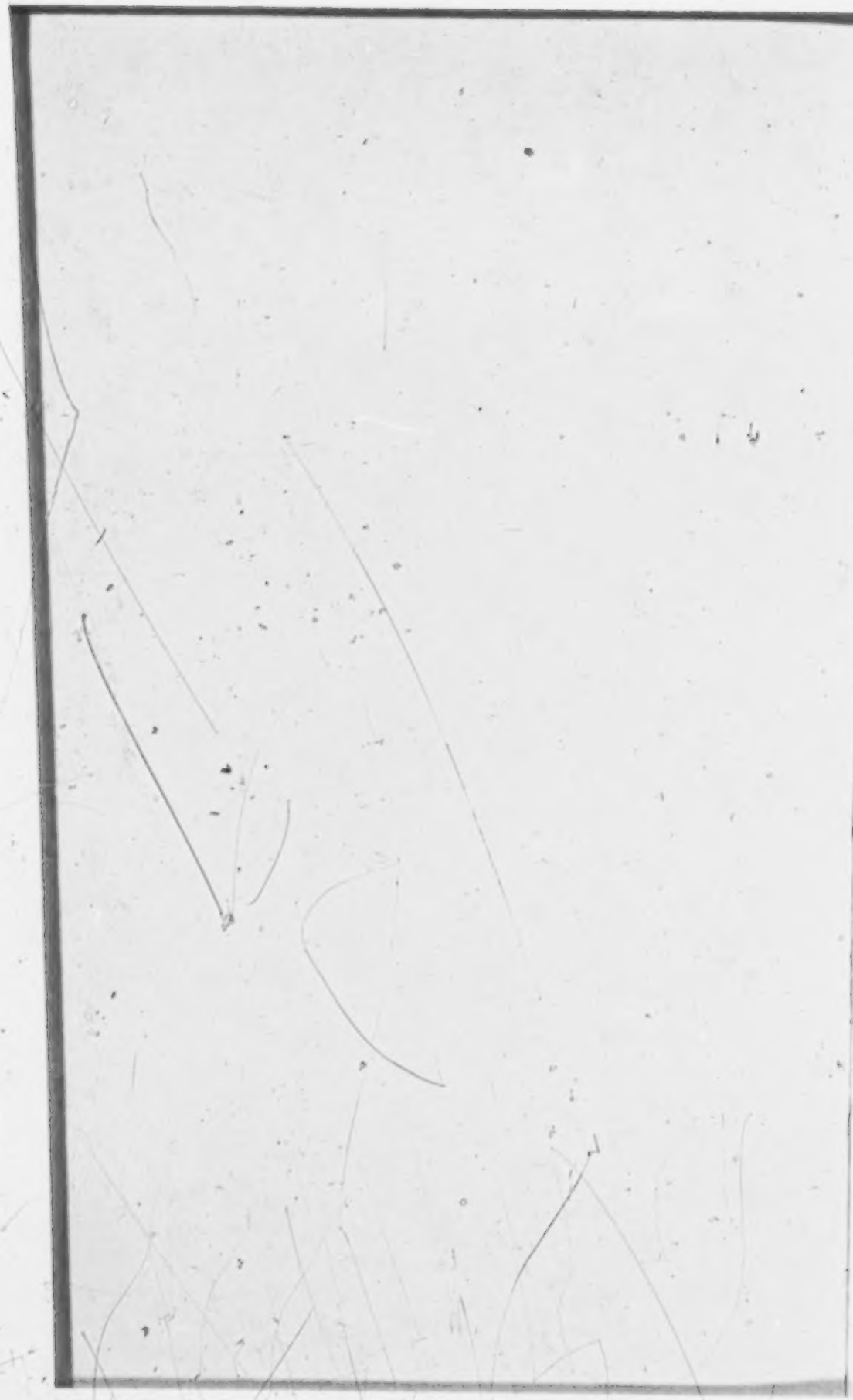

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In the
Supreme Court of the United States

ERNEST EDWIN STONE

VS

Petitioner

STATE OF NORTH DAKOTA AND J.D. WOODLEY, WARDEN OF THE STATE PENITENTIARY AT BISMARCK, NORTH DAKOTA

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

To the Honorable, Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Respondents, State of North Dakota and J.D. Woodley, Warden of the State Penitentiary, at Bismarck, North Dakota, oppose the Petitioner's prayer for issuance of a Writ of Certiorari to review the Order of the Supreme Court of North Dakota quashing writ of habeas corpus rendered and entered against the Petitioner on the 25th day of September 1969. The opinion upon which this order is based is dated September 24, 1969. The opinion has not been officially reported in a State Reporter, but has been reported in 171 N.W. 2d 119. Pursuant to this opinion, a minute order was entered in the docket book quashing the writ. Copies of the opinion are attached to the petition herein.

JURISDICTION OF THIS COURT

The Petitioner states in his petition that he relies upon the provisions of Amendments V, VI, and XIV to the United States Constitution which preserves for him the privilege against compulsory self-incrimination, the right to trial by jury, the right to be informed of the nature and cause of the accusation and to be confronted with the witnesses against him, and to have the assistance of counsel for his defense; and upon 28 U.S.C.A., Section 1257, Subdivision 3, to have writ of certiorari granted and to sustain the jurisdiction of this Court. The Respondents contend that there is no indication that the Petitioner was in any way deprived of these privileges and rights, that Petitioner refuses to testify that he was in any way deprived of these

privileges and rights, and that the records herein affirmatively show by the Petitioner's own testimony that these rights were and are at all times available to the Petitioner, except as limited by the Petitioner's waivers and refusals to accept such rights.

QUESTION PRESENTED FOR REVIEW

These Respondents contend that the basic question presented for review at this point is:

Whether the Supreme Court of the United States should review by writ of certiorari the order quashing writ of Habeas Corpus entered by the Supreme Court of the State of North Dakota?

These respondents further contend that if these proceedings get to the point where the questions the Petitioner claims to wish to present are before the Supreme Court of the United States that they are easily answered by the face of the record available in the proceedings before the North Dakota District Courts and the Supreme Court as follows:

Acceptance of Plea of Guilty

The Petitioner did intelligently and understandingly enter his plea of guilty without the assistance of counsel and the record shows that at the same proceedings all statements made were under oath and were and are fully consistent with and supportive of such plea of guilty.

Waiver of Right to Counsel

The Petitioner by rejecting the trial court's offer of the assistance of counsel and by pleading guilty did make an intelligent and understanding waiver of the right to counsel, the record shows that the Court made an extensive, comprehensive examination of the Petitioner's waiver, and all of the statements made by the accused in the proceedings were under oath and were and are fully consistent with and fully supportive of his plea of guilty.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner presents accurately portions of Amendments V, VI and XIV of the United States Constitution. In so far as they are adequately quoted to the extent included in Petitioner's petition, we will not repeat them at this point, although we will comment that they were adequately considered in all State

District Court proceedings, and in the State Supreme Court proceedings. We further contend that if they were presented to the Federal District Court in a Habeas Corpus proceeding in regard to this case, the Federal District Court must necessarily arrive at the same final result as was reached by the State District Court and State Supreme Court.

We contend, however, that at this point in the proceedings a more important criterion is the statutory provision under which this proceeding purports to be brought. As we understand Petitioner's contention this proceeding is based upon Title 28, U.S.C.A. Section 1257, Subdivision 3, and as we understand the full context of the petition those portions thereof, providing as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> *
> (3) By writ of certiorari, where * * * * * * * * * any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Further, as we understand Petitioner's contentions, it is not brought pursuant to Title 28, U.S.C.A., Section 2241, which provides insofar as here applicable:

> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
> (c) The writ of habeas corpus shall not extend to a prisoner unless * * * * * * * * * * * * * * * * * * *

At this point we believe it is of importance to examine into the reason why the remedy under the Federal certiorari statutes rather than under the Federal habeas corpus statute was chosen by this Petitioner. While we are going to go into the details of why such is the case in a later section of this brief, at this point we will state our conclusion as to this point as follows, to-wit: Each and every point upon which Petitioner claims there has been a violation of, or deprivation of constitutionally protected rights, would require any Court to decide that a factual situation exists directly contrary to the sworn testimony of Petitioner. It is conceivable that facts do exist that might modify the obvious conclusions to be reached from the sworn testimony of the Petitioner, but Petitioner in all proceedings to date has chosen to rely on the Courts, assuming such facts to exist (contrary to the evidence) rather than presenting any evidence of such conceivable facts. This, the State Courts have refused to do, and we presume the Federal Courts will be equally reluctant to assume such facts to exist (contrary to the evidence) whether on habeas corpus or certiorari proceedings.

At this point we believe we should present the distinction between the Federal and State statutes with regard to the remedies available to the Petitioner.

Petitioner's obvious claim is that he is imprisoned pursuant to a plea of guilty made in the State Court. Federal Rule No. 32 (d) appears to be quite strict in regard to withdrawal of such a plea. In so far as here applicable, it states:

> "(d) WITHDRAWAL OF PLEA OF GUILTY. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

The North Dakota rule would appear to be quite liberal as compared with this rule. As statutorily specified in Section 29-14-22 of the North Dakota Century Code, it provides:

> "PLEA OF GUILTY MAY BE WITHDRAWN.—The court, at any time before judgment, upon a plea of guilty, may permit it to be withdrawn. If judgment has been entered thereon, the court may set it aside, and, in lieu thereof, may allow a plea of not guilty, or, with the consent of the state's attorney, may allow a plea of a lesser included offense, or of a lesser degree of the offense charged."

As to the actual operation of this rule, see State vs Magrum 38 N.W. 2d 358, 76 N.D. 527. As to the procedure to utilize this rule, at the present time see Chapter 29-32 of the 1969 Supplement to the North Dakota Century Code.

At this point, we believe it proper to return to the Federal statute under which this proceeding purports to be brought. If Petitioner actually did not fully and intelligently understand his own actions under the State procedure, the simple solution would be for him to make a motion to withdraw his plea of guilty, furnish by affidavit or oral testimony the facts upon which such lack of intelligence or understanding are based, and present same to the State District Court, which accepted his waivers and plea. If the Court refused to grant the motion, same could be appealed to the Supreme Court of this State, at which point the highest Court of this State could render its final judgment or decree upon the actual facts of the case rather than upon speculations as to what facts, contrary to Petitioner's previous testimony, exist as advanced by counsel for Petitioner in habeas corpus proceedings. There is no showing in the current proceeding that the Petitioner has even attempted to secure a final judgment or decree rendered by the highest Court of this State in which a decision could be had as to the factual speculations his counsel now make and, therefore, he is not entitled to certiorari in the Supreme Court of the United States under Title 28 U.S.C.A. Section 1257 or any other law, or rule.

SUPREME COURT RULE PROVISION

Rule 19, of the United States Supreme Court Rules 28 U.S.C.A., page 30, provides insofar as here applicable:

"RULE 19. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
   (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

* * * \

We submit that the records herein show that if a Federal question has been prsented to the Courts of this State in this instance, it has been decided by the Courts of this State in full accordance with the applicable decisions of the United States Supreme Court.

A CONCISE STATEMENT OF THE CASE

On the 4th day of September, 1964, the District Court in and for McKenzie County, North Dakota, ordered that Criminal Informations against this Petitioner be filed. (McKenzie County Transcript, pages 1 and 7). On the 8th day of September, 1964, the matters came on for hearing before the Court. (McKenzie County Transcript, page 1). The State's Attorney of McKenzie County moved to arraign the Defendant. (McKenzie County Transcript pages 2 and 7).

The Court was informed by Petitioner that he was approximately thirty-nine years of age, that he had received an 8th grade education, that he understood the nature of the proceedings, that he was not represented by counsel, that he had given the matter some consideration, that he had been promised no reward or other inducement, that he understood that he had the right to a jury trial, that he had the right to the services of a lawyer, and that he was ready to plead to the Criminal Informations. (Pages 2 through 4 and pages 8 through 9, McKenzie County Transcript). The Court specifically informed the defendant of the nature of the charges, that they were punishable by imprisonment in the State Penitentiary, that he was entitled to trial by jury and to have the services of a lawyer, and that if he was without funds sufficient to employ counsel the Court would appoint an attorney for him. (Pages 3, 8 and 9 McKenzie County Transcript).

The Petitioner specifically indicated that he did not wish the services of an attorney, (Pages 4 and 9, McKenzie County Transcript). He further specifically indicated that he was ready to plead to the charges and did not wish twenty four hours to consider his plea. (Pages 4 and 9, McKenzie County Transcript).

Subsequent to this exchange of information, the Court granted the State's Attorney's motion to arraign the defendant, (Pages 4 and 9, McKenzie County Transcript).

The full text of the Criminal Information charging the crime of rape in the first degree, (Sections 12-30-01, 12-30-04,

and 12-30-05 of the North Dakota Century Code), and the crime of assault with deadly weapon with intent to kill, (Section 12-26-07 of the North Dakota Century Code), was read to the Defendant. (Pages 5 and 6, 10 and 11, McKenzie County Transcript).

Subsequent to the heretofore mentioned proceedings, the Defendant stated that he pleaded guilty to the charges. (Pages 6 and 11, McKenzie County Transcript). At this point the Court inquired further as to whether anyone any officer had promised any reward or subjected him to any threat or coercion to induce him to plead guilty to the charges. (Pages 6 and 11 McKenzie County Transcript). Upon being assured that such was not the case, the Court received the pleas of guilty. (Pages 6 and 11, McKenzie County Transcript).

At this point in the proceedings the States Attorney moved to consolidate the two cases and introduced a considerable amount of testimony and other evidence relating to the events leading up to the eventual conviction and sentencing of the Petitioner herein. Throughout the testimony the Court took an active part in determining the nature of the offenses charged and the intelligent understanding of the Defendant of the precise nature of the offenses charged.

Petitioner in his petition does attempt to take testimony out of parts of the transcript and attempts to show a lack of understanding of the nature of the charges, or that such statements are inconsistent with the pleas of guilty. At this point, rather than outlining the entire events shown in the transcript we will only attempt to place them in proper context to enable this Court to determine that Petitioner did fully understand the nature of the charges and that his statements are fully consistent with his pleas of guilty.

We would certainly not wish this case to be another instance such as Conway vs California Adult Authority decided by the Supreme Court of the United States under date of December 8, 1969, where neither the Petitioner nor the State gave the Court opportunity to consider the facts shown by the available record during the certiorari stage, resulting in an unjustifiable intrusion upon the time of the Court.

We might mention at this point that the Petitioner was apparently no stranger to criminal charges or the charge of rape. (Page 62, McKenzie County Transcript).

At page 4, paragraph 4, of his petition, Petitioner indicates that the initial stabbing by Petitioner was after an argument.

This statement is basically true. There were several arguments as shown in the McKenzie County Transcript prior to the stabbing, i.e. the night before there had apparently been some unfriendly discussion about the Petitioner kissing Mr. Fischer's wife, (Page 15, McKenzie County Transcript), and during the day there had apparently been some unfriendly discussion about the Petitioner taking Mr. Fischer's five year old daughter's panties off, (Page 23, McKenzie County Transcript), etc. However, if this statement is meant to cause this Court to infer that the stabbing was during the course of or immediately after an argument, some consideration should be given to the testimony of Mr. Fischer, (Page 28, McKenzie County Transcript), to the effect that immediately prior to the stabbing it seemed to him that they were getting along pretty well up to the point where he felt a pain, looked down, and noted that Petitioner was pulling his knife out of Mr. Fischer's body, at which point Mr. Fischer assumed that perhaps they were not getting along so well. Petitioner's testimony also does seem to leave some doubts as to whether there was an argument prior to the stabbing. While he does testify that he was told to "shut up for a little while" prior to the stabbing, (Page 50, McKenzie County Transcript), he does not positively indicate that this made him angry. He does concede that "I guess in a way you might say it made me angry", (Page 51, McKenzie County Transcript).

Petitioner also informs us that the only statements made by the Petitioner with regard to "intent to kill" are found on Page 51 of the McKenzie County Transcript, and basically this is also a true statement. The point of difficulty with this concept, however, is that we feel the "intent to kill" can be found throughout the entire record of the proceedings and throughout the events recounted in the McKenzie County Transcript. More specifically, we would call attention to the testimony of Mr. Fischer that he was driving the automobile at sixty, sixty-five miles per hour at the time the stabbing commenced, (Page 28 McKenzie County Transcript), that the stabbing continued as the car was driven off the road, through a ditch, through a fence, and, as Mr. Fischer was pulled out of the car by Petitioner, as he was lying on the ground and subsequently everytime Mr. Fischer moved, to the point where Mr. Fischer succeeded in convincing the Petitioner that he was dead, (Pages 29 and 30 of the McKenzie County Transcript). Petitioner, in substance, admits all of

these events, and after hearing Mr. Fischer's testimony, does not deem it appropriate to deny any phase of it, but rather affirmatively admits it, (Pages 50, 51, and 52, McKenzie County Transcript), at which point his statements that he thought he had killed him and that he took it for granted he was dead necessarily convey the meaning that he had successfully carried out the project undertaken, at least at the point he commenced stabbing Mr. Fischer.

The contentions in the Petitioner's Brief (Pages 5 and 6) as to Petitioner denying any knowledge of sexual penetration, denying penetration and being confused as to whether there was penetration, would possibly be supported by the quotations from the transcript if this were the type of rape case where young people of approximately equal physical abilities and amorous intent were disputing whether they had gone too far in the course of a "necking" party. However, that is not the type of case with which we are here concerned. The rape was immediately after the girl's father had been presumably killed. Virginia Fischer, the rape victim, was five years of age at the time of the rape. (See page 13, McKenzie County Transcript). Petitioner was thirty-nine years of age, (See pages 2 and 8, McKenzie County Transcript). In these circumstances, we submit that the portions of the Transcript quoted indicate no denial or confusion as to whether there was a penetration or not. Obviously in these circumstances there might well be some question to the depth of penetration, and this is precisely what was asked for and what was given in the way of testimony. On the face of the quoted portions of the testimony, as well as the remainder of the testimony on this subject contained in the McKenzie County Transcript, there was no question in Petitioner's mind, as to there being actual sexual penetration. He is not positive that he got his entire penis in though it is obvious that he knew that there was at least a partial insertion. There is, of course, also further testimony as to Petitioner's investigation of this question and his positive statement that would indicate that after his insertion the vagina of the girl was bleeding, (Page 55, McKenzie County Transcript).

HOW FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

We agree with Petitioner's statement that Petitioner made

application to the District Court of Burleigh County, North Dakota, on the 18th day of February 1969, for a Writ of Habeas Corpus and a Writ was issued returnable on the 24th day of February, 1969. The Petitioner also informs us in his petition that "After hearing, the Writ of Habeas Corpus was quashed on the 24th day of February, 1969, the District Judge stating that the Supreme Court of North Dakota had not as yet given the lower court guidelines or minimum standards to follow: (Burleigh County T., page 20)." This statement also contains elements of truth, however, we are certain that this Court will better understand the actual meaning of these elements of truth if we explain the context in which these elements of truth exist.

In the first instance we feel obliged to mention that the statement accredited to the District Judge was made subsequent to the discussions of the Court with counsel. The statement is no part of the final order of the District Judge disposing of the proceeding. We are not certain at this point that briefs of counsel in the State District Court proceeding have been made a part of the record in this proceeding. We hope they have. The brief and argument of Petitioner's counsel were mainly orientated towards a decision of the Michigan Court of Appeals in People vs Taylor, 155 N.W. 2d 723. Unlike most other decisions in this field, the Michigan Court of Appeals in this case sets out a "suggested form of interrogation", a series of form questions, or a "do-it-yourself kit" by which we presume it is intended any Court or probably any police officer subject to the Michigan statutes could solve all questions with regard to the taking of a plea of guilty regardless of the facts, statutes, circumstances, etc. These were what Petitioner's counsel apparently considered to be "guidelines" and the demand of counsel for Petitioner in the Burleigh County District Court proceedings was apparently that the Burleigh County District Judge should compare the questions asked by the McKenzie County, North Dakota District Court Judge, with these questions propounded by the Michigan Court of Appeals under the Michigan statutes, and if there were any discrepancies between the questions asked by the McKenzie County District Court judge and these "guidelines" the prisoner should be released. Actually we do feel that the substance of the material adduced by the questioning of the McKenzie County, North Dakota District Court Judge was more rather than less substantial than the material

that would have been adduced by utilization of the Michigan Court of Appeals' "guidelines". However, the Burleigh County District Court Judge in this statement in the course of discussions with counsel was attempting to point out in language that would be understood by counsel that the proceedings before him were going to be handled by due judicial process, not the application of a set of form questions to an unrelated set of facts under different statutes. We might also note that the Supreme Court of Michigan has also adopted a similar point of view. See People vs Taylor, 156 N.W. 2d 793, which stays all proceedings in the Court of Appeals case requires the Court of Appeals to certify the original record of the case to the Michigan Supreme Court, and that when certified, that record with this order of the Supreme Court will stand as and for the record of a granted application by the people for leave to review the judgment, whereupon submission of such granted appeal will proceed according to further order or orders. If this point is of importance we might mention that the Supreme Court of this State does in its opinion in this case, attached as an appendix to the petition, cite some of the "guidelines", cases, and statutes available in this State though it also does not specify a series of form questions to be applied to all fact situations.

We agree with Petitioner's statement that Petitioner then made application to the Supreme Court of North Dakota for a Writ of Habeas Corpus on the 6th day of June 1969, the Writ was issued returnable on the 25th day of June 1969, and that pursuant to opinion dated September 24, 1969, the Supreme Court of North Dakota quashed the writ.

ARGUMENT

Petitioner informs us at this point, (Page 7 of his petition), in language somewhat different from his "Questions Presented for Review", (Page 2 of his petition), that the questions presented for review are the effectiveness of the Petitioner's waiver of the right to counsel and the question as to whether his guilty plea was voluntarily made. We feel there is also a factual and procedural problem in this case. We note also that the Petitioner informs us that the North Dakota Supreme Court definitely did not apply Federal standards in considering this case.

As to the factual basis, it would appear to us that Petitioner

expects the North Dakota Burleigh County District Court and the North Dakota Supreme Court to create or assume facts without evidence and in direct contradiction to the facts as shown by the McKenzie County Transcript, such as his contention that the Defendant was confused or did not fully understand the offer of counsel, the offer of a jury trial, that he denied any intent to kill, that he denied any sexual penetration, etc. If Defendant actually did not fully understand or was confused as to these elements, it would seem a simple matter to establish such fact, if such is the fact, by a simple affidavit made as a part of a motion to withdraw his plea of guilty under the very liberal North Dakota Rule, such as was done in the State vs Magrum case, cited supra. Defendant, however has not chosen the route set out in the Magrum case or in the North Dakota statutes on the subject, also cited supra.

Instead, the Petitioner has chosen to proceed by writ of habeas corpus in the State Courts. The District Court of Burleigh County and the North Dakota Supreme Court have considered the entire record of these proceedings, have considered and have applied the case and statutory law presented to it by Petitioner, and have applied the standards set forth therein to the record presented, excepting possibly, of course, the decision in People vs Taylor cited supra, the form questions and statutory background of which had not previously been adopted in this State by either legislative or judicial process.

As pointed out in the petition, the Supreme Court of this State did call attention to Sections 29-01-06, 29-01-27, (now Sections 29-07-01 and 29-07-01.1 of the 1969 Supplement to the North Dakota Century Code), and Section 29-13-03 of the North Dakota Century Code, and various judicial decisions of the Supreme Court of this State in arriving at its conclusion. At this point we would disagree with the context of Petitioner's statement that the North Dakota statutes cited and the North Dakota cases thereafter cited are not the proper tests for determining the effectiveness of a waiver of rights guaranteed by the United States Constitution. Certain somewhat similar rights are granted by these North Dakota statutes and the North Dakota Constitution. Regardless of whether these State rights are also guaranteed by the United States Constitution, it was the responsibility of the Burleigh County District Court and of the North Dakota Supreme Court to grant

Petitioner his rights on these bases if he had not effectively waived his rights thereunder. The Supreme Court of North Dakota did not purport to hold the same tests would necessarily apply to waiver of these rights as would apply to waiver of his Federal rights, but did properly consider, as was their responsibility, whether there had been a wai er or violation of these State rights. In addition to consideration of the application of the waivers of these State rights, the North Dakota Supreme Court did consider whether there were adequate protection of, or waivers of the rights guaranteed the Petitioner under the Federal Constitution. Assuming that the State Supreme and District Courts actually did consider and adequately apply, Petitioner's Federal constitutional rights, it is not of great moment whether the Federal and State rights require application of different or the same standards. However, we are not necessarily convinced by Petitioner's argument that there is a substantial difference between the standards applied under the State Constitution and statutes and the Federal Constitution and statutes.

The Federal cases cited by Petitioner apparently look to the question of whether the guilty plea was "intelligent and voluntary", whether the rejection of the right to counsel was "intelligently and understandingly" made, Boykin vs Alabama ____U.S.____, 23 L. ed 2d 274, 89 S.Ct. ___ (1969). Johnson vs. Zerbst 304 U.S. 458, 82 L. ed 1461, 58 S. Ct. 1019, (cited in the North Dakota Supreme Court decision in this case), appears to require a competent and intelligent waiver by the accused. Carnley vs Cochran 369 U.S. 506, 8 L. ed 2d 70, 82 S. Ct. 884, appears to require that the waiver be intelligent and understanding. Von Moltke vs Gillies, 92 L. ed 309, 332 U.S. 708, 68 S. Ct. 316, would appear to indicate that the waiver of counsel should be "understandingly and wisely made" and that it should be an "intelligent and competent" waiver.

The Supreme Court of the State of North Dakota in previous cases has examined into the question of whether the Petitioner on habeas corpus was deprived of his rights under the Constitution or the laws or the treaties of the United States so that he is entitled to be released from custody. (Fournier vs Roed, 161 N.W. 2d 458, N.D. 1968). It has held that pleas of guilty must be free and voluntary. (State vs Layer, 48 N.D. 366, 184 N.W. 666, State vs Throndson, 49 N.D. 348, 191 N.W. 628). State vs O'Neill, 117 N.W. 2d 857 (N.D. 1962), indicates that waivers of counsel, and pleas of guilty must be freely, knowingly, and un-

derstandingly made. State vs Magrum, (N.D. 1949) 76 N.D. 527, 29 N.W. 2d 358), indicates that pleas of guilty must be freely and understandingly made. State vs Malnourie, 67 N.W. 2d 330 (N.D. 1954), turns basically upon the question of whether the plea of guilty was voluntary and further indicates that the defendant must have actual knowledge of his guilt, to sustain a plea of guilty. State vs Whiteman (N.D. 1954) 67 N.W. 2d 599, a case related in factual situation to State vs Malnourie, discusses the legal aspects of these matters in much more detail, indicating that waiver of counsel must be free and responsible, competent and intelligent, intelligent and understanding. It indicates further that pleas of guilty must be made with complete understanding, freely and understandingly, and considers at some length such decisions as Powell vs Alabama, 287 U.S. 45, 53 S. Ct 55, 77 L. ed 158, 84 A.L.R. 527; Johnson vs Zerbst, 304 U.S. 458, 5 S. Ct 1019, 82 L. ed 1461, 146 A.L.R. 357; and Betts vs Brady, 316 U.S. 455, 62 S. Ct 1252, 86 L. ed. 1595. In addition to the United States Supreme Court decisions cited by the North Dakota Supreme Court in the instant case, each of these North Dakota decisions was considered and cited therein.

On these bases, as well as the bases recited by the North Dakota Supreme Court in the instant case, we must necessarily agree with Petitioner's conclusion that we can look to the long-standing Federal standards to determine the effectiveness of a waiver of the right to counsel and of the plea of guilty, however, we are inclined to disagree with any implication that the State of North Dakota and its Supreme Court is applying standards in the application of Federal Constitutional rights differing in substance from those heretofore applied by the United States Supreme Court.

The Von Moltke vs Gillies decision, (92 L. ed 309, 332 U.S. 708, 68 S. Ct 316), cited by petitioner is interesting, however, like the State vs Malnourie and State vs Whiteman, North Dakota cases previously cited herein would appear to involve elements of actual coercive forces (when considered on the basis of the differences in condition of the Defendants in the respective cases), and are inapplicable to the situation of Petitioner in this instance, there being no evidence or even implication of any use of coercive forces.

We do, of course, contend that the questions asked by the trial court considered in Petitioner's Statement of the Case in proper context as outlined in this brief in opposition or in the full light of the entire McKenzie County Transcript, do con-

stitute a "penetrating and comprehensive examination of all circumstances under which the plea was tendered". The questions and answers quoted in the petition herein standing alone are practically meaningless, however, in proper context we do submit that they show an intelligent and understanding waiver by the accused.

We further contend that the information contained in the McKenzie County Transcript fully shows that the Defendant had the necessary "intent to kill" and had accomplished sufficient sexual penetration. It further discloses apparent knowledge of the Defendant as to the evidence against him to establish these elements of the crimes. While very probably Petitioner is not qualified to write a legal brief on these elements of these crimes, citing appropriate authorities, etc., he had full knowledge of the factual events he did admit and was duly warned of the legal consequences of such factual events.

Petitioner informs us with great emphasis that Defendant was never advised that the maximum punishment for the crime of rape in the first degree could be LIFE IMPRISONMENT. He does not further define that conclusion as indicating whether he refers to life and a day, the rest of his natural life, or merely a long term of years. He does not indicate whether he feels Petitioner should have been told of the distinction between a prison year and a calendar year, the function of the State Pardon Board and the State Parole Board, the element of good time gained by labor, etc. He does not indicate whether such elements as cruel and unusual punishment restrictions on sentencing, customary practices in sentencing, etc., should be included in his requested dissertation on LIFE IMPRISONMENT or not. We cannot help but feel that any statement that rape in the first degree could be punished by LIFE IMPRISONMENT in this State would be in practicality false, if for no other reason, we are familiar with no instance in which such a sentence has been imposed in this State. We do think it is important that while the Defendant does appear throughout the Transcript as intelligent, competent, and understanding, he does not purport to be educated in the law, a college graduate or the like. Too much detail on the more intricate elements of the situation would have only served to confuse him. He was told in practically the words of the statutes the punishment for the crimes charged. He was examined thoroughly as to each element of the crimes charged, and unquestionably was guilty of them. His request, however, was to plead guilty not

to be thoroughly educated in the field of law. The Court must necessarily to some extent accede to the wishes of the Defendant and we cannot help but feel that the Defendant would have been only confused by the addition of too much extraneous material.

We must necessarily agree with Petitioner that Boykin vs Alabama___U.S.____23 L. ed. 2d 274, 89 S. Ct ___(1969), indicates that a plea of guilty involves the waiver of certain Federal constitional rights. We must disagree, however, that Petitioner was questioned only as to the right to a trial by jury and the right to counsel, or that the record is "silent" as to Petitioner's knowledge of the privilege against self-incrimination, the right to confront one's accusers, the right to compulsory process for obtaining witnesses in his favor and other rights guaranteed by the Federal Constitution. There are admittedly problems with a non-legally trained person handling a criminal case, however, the Petitioner had firmly stated that he did not wish counsel. The trial court definitely gave the Petitioner the right to cross-examine the witnesses against him by specifically asking him whether he had any questions to ask of these witnesses, (Pages 37 and 69 McKenzie County Transcript). The Court specifically asked the Defendant whether he objected to certain exhibits, (Pages 68 and 69, McKenzie County Transcript), specifically informed the Petitioner that the medical exhibits could not be received into evidence over his objection. Insofar as there had been no opportunity for cross examination, the Court specifically asked the Defendant whether there were any witnesses he wished to call, (Page 69 McKenzie County Transcript), and specifically asked the Defendant whether he had any legal cause to show why judgment and sentence should not be pronounced, (Page 71, McKenzie County Transcript). In each instance the Defendant's answer was fully in accordance with the position he had previously taken to the effect that he wished to plead guilty and suffer the consequences of his actions without exercising these rights.

Petitioner further states in his petition that the constitutional rights of the Defendant on his preliminary hearings were covered in the printed portion of the return of the County Justice. He objects strenuously to the fact that in addition to the specified rights some of these rights are encompassed within the printed phrase "etc. etc", states that this is a rather cursory way of treating constitutional rights, and con-

siders it unthinkable that a State Supreme Court should rely, even partially, on such a document yet in the immediately preceding paragraph of his printed petition (Pages 10 and 11) he apparently expects the Supreme Court of the United States to place reliance upon his statement specifying certain constitutional rights and including the remainder in his phrase: "and other rights guaranteed by the Federal Constitution". We cannot but hope that this court feels as justified in relying on the "etc. etc." rights determined by the county justice as it does in relying on these "other" rights. Petitioner, however, gives us no other basis for questioning the accuracy of the determination of the county justice, nor does he apparently question that they do constitute positive evidence, a part of the record in this case, that Defendant was granted these rights.

Petitioner concedes that he does not suggest that Halliday vs United States ___U.S.___, 23 L. ed. 2d 16, 89 S. Ct ____requires that Rule No. 11 of the Federal Rules of Criminal Procedure be applied to State cases retroactively. While we appreciate this concession we nevertheless contend the District Court for McKenzie County did not accept the plea of guilty in this instance without first addressing the Defendant personally and determining that the plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea. We further contend that the District Court for McKenzie County did not enter a judgment upon this plea of guilty until it was satisfied that there was a factual basis for the plea. We might add at this point that we feel that the District Court for McKenzie County thoroughly examined into each element of the crimes alleged and in each instance the Petitioner answered knowingly, understandingly and intelligently, proving the existence of the factual basis of such element beyond any doubt. In these circumstances we feel that the District Court of McKenzie County fully complied with the provisions of Rule No. 11 of the Federal Rules of Criminal Procedure though it was not subject to such rule.

Petitioner further points out that the State District Judge presiding at the habeas corpus hearing expressed doubt as to whether the minimum standards for acceptance of a plea of guilty and waiver of counsel had been met. At this point we feel it proper to mention that the State District Court of Burleigh County had full authority to grant the writ of habeas corpus and to release the Petitioner upon such writ but, in

effect, determined that the Petitioner had no basis for such writ or such release. The only error we find in that proceeding is that statement at lines 18 and 19 of Page 18 of the Burleigh County Transcript that:

("155 N.W. 2d 723, In that case the Supreme Court of Michigan")

As we have previously pointed out, the case reported at 155 N.W. 2d 723, is a decision of the Michigan Court of Appeals, not of the Supreme Court of Michigan. The correct citation of the Supreme Court of Michigan decision in regard to that case in People vs Taylor 156 N.W. 2d 793. Also, we might point out that the District Court of Burleigh County at page 18 of the Burleigh County Transcript did not express doubt generally as to whether the minimum standards for acceptance of a plea of guilty and waiver of counsel had been met. What it did state in this respect at page 18 of the Burleigh County Transcript was: ("***there is a serious question as to whether or not the minimum standards, at least as the Michigan court outlined them, were met in this case.")

To conclude the basic argument portion of this brief, in opposition we must necessarily disagree that there was or, in this case could have been any failure of the North Dakota Supreme Court to apply proper constitutonal standards, that this is or could be considered a case where there was not an effective waiver of counsel or an intelligent and well-informed guilty plea.

In so far as we have to this point, at Petitioner's behest, considered at some length the deliberations of the Burleigh County District Court, we would like to take the liberty of expanding on a statement of the trial court. We note at page 71, McKenzie County Transcript, the statement of the Court that:

"Well, we're not here to punish the Fischers."

(The Fischers, of course, were the people injured by the crimes charged.)

Section 12-28-14 of the North Dakota Century Code provides:

"12-28-14. SLANDER OF FEMALES-MISDEMEANOR.—A person who, in the presence and hearing of a person other than the female slandered, whether such female is present or not, maliciously speaks of or concerning any female of the age of twelve years or upwards, not a public prostitute, any false and defamatory words or language injuring

or impairing the reputation of such female for virtue or chastity, is guilty of a misdemeanor."

Possibly, since the advent of the Kinsey report, it could be contended that the chastity of females is no longer of such great importance, and unquestionably the quoted statute does not apply to a female of the tender years of the victim in this instance. Neverthless, it seems an unfortunate result if the final result of all the legal proceedings here concerned would be that the reputation of the victim for chastity would be forever impaired by the records of the McKenzie County District Court, but that the Petitioner, who actually did furnish or allow to be furnished by failure to object to relevant evidence, the information on that record would be held completely irresponsible for the actions therein set forth. It would seem a much better result, and one more in keeping with the usual social standard, that one wishing to escape responsibility for his sexual exploits be required to at least deny such exploits. On such basis we would again recommend that if Petitioner does wish to rely on questioning the validity of his plea of guilty rather than on the mercies of the State Board of Pardons and Paroles, that he utilize the standard North Dakota procedure of moving to withdraw his plea of guilty, furnish the necessary evidentiary material appropriate to such motion, and allow the record to be cleared if he is to be held irresponsible for these activities.

On this basis, again we differ with Petitioner as to the propriety of the use of the writ of certiorari or the writ of habeas corpus to question the validity of the trial court proceedings.

Dated this ___ day of January, 1970, at Bismarck, North Dakota.

Respectfully submitted,

By: HELGI JOHANNESON
ATTORNEY GENERAL,
STATE OF NORTH DAKOTA

JOHN E. ADAMS
ASSISTANT ATTORNEY GENERAL,
OF THE STATE OF NORTH
DAKOTA ATTORNEY FOR
RESPONDENTS